

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

Applicants: Curtis HEISEY, et al. **Docket No:** 3740.US.P
Serial Number: 10/016,597 **Group Art Unit:** 2192
Filed: October 26, 2001 **Examiner:** Eric KISS
Re: Intelligent Device Upgrade Engine

July 3, 2007

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

REPLY BRIEF FOR APPEAL

Dear Sir:

The Applicants hereby submit the following Reply Brief in response to the Examiner's Answer mailed on June 12, 2007. The Examiner's Answer was in response to a Notice of Appeal filed on October 12, 2006 by the Applicants and the Appeal Brief filed by Applicants on December 22, 2006.

The commissioner is authorized to charge deposit account 503650 for any fees associated with either filing.

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I. STATUS OF CLAIMS

Claims 1-37 are pending in this application. Claims 1, 10, 18, 19, 20, and 33 are independent. Claims 1-37 stand rejected. This Reply Brief addresses Claims 1-18 as presented in the July 6, 2006 "Response to Office Action". Claims 19-37 are not being pursued in this Appeal. A copy of the claims can be found in the Appendix of this Appeal Brief.

The Examiner is correct in his comments concerning claim 38. Applicants incorrectly used the number 38 instead of 37 for the final claim number throughout the Appeal Brief. Claim 38 does not exist in this application.

II. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-17 stand rejected by the Examiner under 35 U.S.C. § 102(e) in view of U.S. Patent Application No. 2003/0126195, filed by Daniel A. Reynolds *et al.* on April 10, 2001 (hereinafter, "Reynolds").

Claim 18 stands rejected by the Examiner under 35 U.S.C. § 103(a) as being unpatentable over Reynolds in view of U.S. Patent No. 6,549,943, issued to Maximilian Spring *et al.* on April 15, 2003 (hereinafter, "Spring").

GROUND FOR REJECTION NOT ON REVIEW

Claim 19 is rejected by the Examiner under 35 U.S.C. § 102(e) in view of Reynolds.

Claims 20-37 stand rejected by the Examiner under 35 U.S.C. § 103(a) as being unpatentable over Reynolds in view of U.S. Patent Application No. 2001/0055017, filed by Bas Ording *et al.* on January 5, 2001 (hereinafter, "Ording").

III. ARGUMENT

The background of the claims in the present application and the teachings of Reynolds have been clearly articulated in the Response to the Final Office Action, the Pre-Appeal Brief, and in the Appeal Brief, all of which are incorporated here by reference, and will not be repeated here. Each of the briefs has outlined the clear distinction between Claims 1-18 of the present invention and the teachings of Reynolds. These distinctions provide the foundation upon which the following discussion is based.

A. Reynolds does not teach the change of attributes of an embedded device

Claims 1-18 recite, either word for word or with similar language, "...monitoring program code, asynchronous with respect to said control program code, for generating at least one event indication in response to a **change** of at least one **predetermined attribute of said embedded device** and forwarding said at least one event indication to said control program code...".

Within Reynolds, there are several paragraphs (Abstract, [0504] through [0506]) that teach the downloading of firmware from a directory into an embedded device. The Examiner's Answer does not dispute that Reynolds's trigger for the download comes from a source outside of the embedded device (it is triggered by the presence of a file in a directory on a server).

The issue is that the Examiner's Answer interprets the term "of said embedded device" broader than the Applicants and broader than is reasonable. In the Examiner's Answer, the term "of" is asserted to include attributes either inside or outside of the embedded device, thus attempting to stretch this term to include Reynolds's teachings.

However, this interpretation is improper. According to the American Heritage Dictionary, 4th Edition, (as quoted on www.yourdictionary.com) the most common definitions of the word "of" mean "1. Derived or coming from; originating at or from:

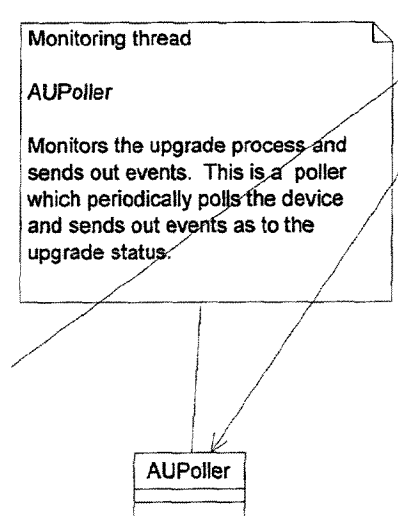
customs of the South. 2. Caused by; resulting from: a death of tuberculosis.”¹ The Webster’s II New Riverside Dictionary defines “of” as “1. from; 2. caused by;...”² in the two most common meanings for the word.

Reynolds teachings do not detect “a change of at least one predetermined attribute **[from]** said embedded device.” The files and directories in Reynolds do not come from the embedded device. See Reynolds at [0498] and [0504].

Nor do his teachings detect “a change of at least one predetermined attribute **[caused by]** said embedded device”. Reynolds’s teachings (at [0498]) show that the download is caused by the customer loading a CD or downloading files from a web site. As such, the breadth of the claims as asserted by the Examiner’s Answer can not be sustained.

Furthermore, the expansion of the term “of said embedded device” to include attributes outside of the embedded device is not proper in light of the specification. Figure 5 of the present application demonstrates the Monitor Thread 102 issuing a Monitor Command 116 through the Network Device Abstraction 104 to the Actual Device 106 via a SNMP or HTTP query 118 and SNMP or HTTP response 120. This is described in [0055].

This can also be seen on page 62 in the original filing, provisional patent application 60/294,049, which is incorporated by reference in the present application at [0018].



¹ “OF DEFINITION”, The American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company, 2000 as cited in <http://www.yourdictionary.com/ahd/o/o0036500.html>.

² “of”, Webster’s II New Riverside Dictionary, Revised Edition, Houghton Mifflin Company, 1996.

The descriptions in the specification clearly show that the claim term “of said embedded device” excludes the use of external attributes, and that the monitoring program code looks at an attribute in the embedded device. Without the Examiner’s expansion of the word “of” to include external attributes, Reynolds does not anticipate claims 1-18.

B. Reynolds does not teach attributes specific to said embedded device

Reynolds teaches that the download files are generic, and that they may be downloaded to any of the embedded devices. They are not specific to the embedded device, but are separate from the device and are changed independently of the embedded device. They are not specific attributes of the embedded device. See Reynolds at [0505]:

[0505] Once all software components are verified, the master SMS opens (and decompresses, if necessary) an upgrade instruction file also included as one of the software components loaded into sub-directory **1220** from the Installation Kit. The upgrade instruction file indicates the scope of the upgrade (i.e., upgrade mode). For instance, the upgrade instruction file may indicate that the upgrade may be hot or cold or must only be cold. The upgrade instruction file may also indicate that the upgrade may be done only across the entire chassis—that is, all applications to be upgraded must be upgraded simultaneously across the entire chassis—or that the upgrade may be done on a board-by-board basis or a path-by-path basis or some other partial chassis upgrade.

As such, the Reynolds’s files are not “attributes of said embedded device”, but are instead generic attributes. The Examiner’s Answer does not address this distinction between Reynolds and claims 1-18.

C. Reynolds does not teach predetermined attributes

Furthermore, those files are not predetermined, as required by claims 1-18. The files in Reynolds arrive asynchronously and will be unique. They are put in

newly created directories and subdirectories, and the SMS searches for those new subdirectories. They are not predetermined. See Reynolds at [0504]:

[0504] Master SMS 184 periodically polls installation directory 1222 for new sub-directories including new releases, for example, release 1.1 1218 in sub-directory 1220. When the master SMS detects a new release, it opens (and decompresses, if necessary) the packaging list in the new sub-directory and verifies that each software component listed in the packaging list is also stored in the new sub-directory. The master SMS then performs a checksum on

Furthermore, Reynolds, at [0505], teaches that the embedded devices to download are only known when the SMS opens the upgrade file to read the instructions. This is a very indeterminate process, and the opposite of the Applicants claim of a predetermined attribute.

The Examiner's Answer asserts that the availability of such new releases may be considered predetermined attributes. However, this argument is a contradiction. How can something new be predetermined? It is inherent in the argument and in Reynolds that those download directories are new and arrive during the operation of the SMS, and therefore can not, by definition, be predetermined.

IV. CONCLUSION

The pending claims define subject matter that is distinct from Reynolds both independently and in combination with Spring. Therefore the pending claims are patentable under 35 U.S.C. § 102(e) and 35 U.S.C. § 103(a). Claims 1-18 are pending and in condition for allowance.

Applicants respectfully request that the Board reverse the outstanding rejections and direct the Examiner to promptly issue this application.

Respectfully submitted,



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